IN THE HIGH COURT OF UTTARAKHAD, AT NAINITAL

Criminal Appeal No. 166 of 2007
(Old No. 1725 of 1986)

Hamid Ali S/o Saukat Ali,
R/o Village Pandri Sitar Ganj
District Nainital (now U.S. Nagar) ...Appellant.

Vs.

The State of U.P. ..Respondent.

Dated: November 19, 2007

Hon'ble B.C. Kandpal, J.

This appeal U/S 374(2) of the Cr.P.C. has been filed against the judgment and order dated 18.6.1986, passed by II Additional Sessions Judge, Nainital in S.T. No. 178 of 1983, convicting the appellant under Section 307/34 and sentencing him to undergo four years R.I.

2- The prosecution story, in short, is that on 21-10-1982 Ramesh Lal injured was having a cup of tea in the canteen situated in the Civil Court Campus Haldwani. At 1.40 P.M. Hamid Ali also entered the shop. He was accompanied by Ajab Singh. Hamid Ali instigated Ajab Singh to cause the death of Ramesh Lal. Ajab Singh was armed with sword. He assaulted Ramesh lal with sword. In the mean time Tara Singh, Ganga Singh also entered the canteen. They were armed with sword and Kanta. They also caused injures to Ramesh Lal with their

respective weapons and when they knew that Ramesh Lal died they left him and ran away from the spot by a jeep. This incident was sent by Harbans Lal, Ram Lochan Singh, Sunder Lal, and Hansraj. After the incident the injured was brought to Civil Hospital. His brother Khairati Lal went to Police Station and lodged F.I.R. there against Hamid Ali, and other co-accused. Injured Ramesh Lal was medically examined. The case was investigated and a charge sheet U/Ss 147, 148, 307, 120-B I.P.C. was submitted against all the accused persons. The Judicial Magistrate Haldwani, committed the case to the Court of Sessions for trial.

3- The learned Sessions Judge charged the accused Ajab Singh, Hamid Ali, Jeet Singh, Ganga Singh and Avtar Singh @ Tara Singh U/Ss 307/149 I.P.C., 148 I.P.C. Accused Gurubachan Singh, Shaukat Ali, Hamid Ali, Ganga Singh, Avtar Singh @ Tara Singh and Ajab Singh, were also charged U/S 120-B I.P.C. Accused Hamid Ali was again charged U/S 147 I.P.C. they pleaded not guilty and claimed to be tried.

4- The prosecution in support of its case examined the following witnesses:-

P.W.1, Ramesh Lal, injured eyewitness, P.W.2, Khairati Lal, informant and witness of facts, P.W.3, Sundar Lal is also the eye witness of the incident, P.W.4, R.B. Aggarwal is also witness of fact, P.W.5, Hanssraj is also eye witness of the occurrence, P.W.6, Dr. S.P. Singh has medically examined the injuries of injured Ramesh Lal and submitted supplementary injury report, Ext Ka.2 P.W.7, Gurumel Singh is the witness of

the fact that he had heard the accused persons telling with each other that Ramesh Lal be finished, P.W.8, Subeg Singh has not supported the prosecution case and he has been declared hostile in the case, P.W.9 Ghanshyam Pandey, Pharmacist has proved the injury report, Ext. Ka.3 prepared by Dr. S.K. Gupta about the injuries of Ramesh Lal in Civil Hospital Haldwani, P.W.10, S.I. R.A. Sharma, has investigated the case and submitted charge sheet, Ext. 8 against the accused persons and P.W. 11, Dr. S.K. Gupta has proved the injuries on the person of injured and also proved injury report Ext. Ka.3 prepared by him.

5- The accused persons in their statements U/S 313 Cr.P.C. denied the prosecution story and have alleged that they have been falsely implicated in the case.

6- The learned Sessions Judge after considering the evidence on record and having heard learned counsel for the parties, acquitted the accused Ajab Singh, Jeet Singh, Ganga Singh, Avtar Singh alias Tara Singh, Gurubachan Singh and Shaukat Ali from the charges levelled against them. However, accused Hamid Ali was found guilty of the offence punishable U/S 307/34 I.P.C. and he was sentenced to four year's R.I.

7- Feeling aggrieved the accused/appellant has preferred this appeal before this Court.

8- I have heard the learned counsel for the parties and have gone through the record.

9- Learned defence counsel has argued before me that the main assailants have been acquitted in the case and the case of acquitted co-accused was similarly placed on same set of facts and on similar accusations, therefore, benefit of that decision can be extended to the accused/appellant. Leaned counsel in support of his submission has cited before me the case of **Deepak Rajak Vs. State of West Bengal** reported in **Supreme To-Day paged 217.**

10- The learned A.G.A. has opposed the submission of the learned counsel for the accused/appellant and urged that the role of the present accused/appellant was different to that of acquitted accused and the learned Sessions Judge has rightly convicted the accused/appellant.

11- To substantiate the submissions of the learned counsel for the parties, it is necessary to go through the evidence on record.

12- P.W.1, Ramesh Lal is the injured eye witness. He has deposed that on 21.10.82 he, Khairati Lal and their uncle had come to the Court of IIIrd Addl. Munsif Magistrate, Haldwani. His case with Ram Pyari was fixed in the Court and accused Hamid had come as Pairokar on behalf of Ram Pyari. At about 1.40 P.M. Hamid Ali entered the shop where this witness was already there in order to have a cup of tea. He was accompanied by Ajab Singh. Hamid Ali instigated Ajab Singh to cause the death of Ramesh Lal. Ajab Singh was armed with sword. He assaulted Ramesh Lal with sword. In the meantime

accused Tara Singh, Ganga Singh, also entered the Canteen. They were armed with sword and Kanta. They caused injuries to Ramesh Lal by deadly weapons. When they knew that Ramesh Lal died they left him and ran away from the spot by a jeep. This witness has admitted that he had enmity with Ajab Singh pertaining to partition of Rice Mill and case U/S 107/116 Cr.P.C. was also fought between the parties. Thus from the evidence of the injured eyewitness it is quite clear that accused Hamid Ali did not cause injury to Ramesh Lal, rather accused Ajab Singh, Tara Singh and Ganga Singh took active part in the commission of crime by causing injuries to this witness.

13- P.W.2, Khairati Lal was also with the injured at the time of occurrence. This witness is the brother of Ramesh Lal, injured. This witness had seen the occurrence sitting on the bench of his counsel. He had lodged the F.I.R. of the incident. According to this witness Ramesh Lal went towards Canteen to have a cup of tea, accused Hamid Ali also followed him. Thereafter accused Ajab Singh, Jeet Singh, Ganga Singh and Tara Singh also came there. Jeet Singh was having a sword and other were having Kantas. This statement of this witness is contradictory to the statement of P.W.1, Ramesh Lal where he said that accused Ajab Singh was armed with a sword and he caused injury to him by the sword. P.W.2, Khairati Lal, further alleged that he heard the noise 'Bachao Bachao'. When he, Harbans Lal and Sundar Lal went inside the Canteen they saw that Ramesh Lal came out of Canteen in injured condition. Accused Jeet Singh and Ganga Singh surrounded him and all the four accused persons

had beaten the injured. This witness has given different facts about the actual marpit. According to injured Ramesh Lal accused Hamid Ali did not participate in the maripit whereas this witness has stated that Ramesh Lal was followed by Hamid Ali and when he came out of the Canteen in injured state, accused Ganga Singh, Jeet Singh, Ajab Singh and Tara Singh surrounded him and had beaten him. Accused Hamid Ali was instigating these accused persons to kill Ramesh Lal. This witness has not stated that Hamid Ali had beaten Ramesh Lal inside the canteen.

14- P.W.3, Sundar Lal is also the witness of the incident. He has heard Hamid Ali telling to kill Ramesh Lal and accused Ajab Singh, Avtar Singh, Ganga Singh and Jeet Singh were assaulting Ramesh Lal.

15- P.W.4, R.B. Agarwal, has deposed that he also heard the noise-'Bachao Bachao'. Ramesh Lal was crying. Ramesh Lal in an injured condition was fallen down out side the canteen. The assailants were four sardars. He did not know to them.

16- P.W.5, Hansraj has deposed that Ramesh Lal was beaten by Ajab Singh, Jeet Singh, Ganga Singh and Avtar Singh. Besides these, accused Hamid Ali was also there and he was instigating the accused persons to kill Ramesh Lal.

17- P.W.6, Dr. S.P. Singh has medically examined injured Ramesh Lal on 5.11.1982 at Civil Hospital, Haldwani. This witness has given supplementary injury report, Ext. Ka.2 and in his

opinion injury to the skull was dangerous to life as brain matter was coming out of the brain.

18- P.W.7, Gurumel Singh has shown the presence of all the seven accused persons namely Gurubachan Singh, Shaukat Ali, Hamid Ali, Ganga Singh, Avtar Singh, Ajab Singh and Jeet Singh together and stated that Gurubachan Singh and Shaukat told his companions to kill Ramesh Lal.

19- P.W.8, Subeg Singh did not support the prosecution case and he was declared hostile at the instance of the prosecution.

20- P.W.9 Ghanshyam Pandey has proved the original injury repot of Ramesh Lal from the injury register, the copy of which has been filed Ext. Ka.3.

21- P.W.10, S.I. R.A. Sharma, has investigated the case and proved the prosecution papers prepared by him during the investigation.

22- P.W.11, Dr. SK. Gupta has examined the injures of injured Ramesh Lal on 21.10.82 at 2.35 P.M. in the Civil Hospital Haldwani. The doctor found six incised wounds, one abrasion and one traumatic swelling on the person of the injured.

23- Thus, from the above statements of the witnesses, it is quite clear that the accused/appellant Hamid Ali has been assigned the role of instigating the other accused persons to cause injuries to Ramesh Lal and the other four persons namely Ganga Singh, Avtar Singh alias Tara Singh and Jeet Singh have been named by witnesses P.W.1,

Ramesh Lal, Khairati Lal, P.W.2 and P.W.5, Hansraj whereas P.W.7, Gurumel Singh has also given exaggerated version by naming Gurubachan Singh and Shaukat Ali. Therefore, the present accused/appellant Hamid being a member of unlawful assembly had the role of instigator and his offence was similar to that of other co-accused in furtherance of common object to assault the injured. No separate role has been assigned to present accused/appellant Hamid Ali.

24- It is also pertinent to mention here that the trial court has acquitted all the accused including the present accused/appellant Hamid Ali for the charge U/S 120-B I.P.C. The reason recorded by the trail court is that P.W.7, Gurmel Singh has not disclosed the talk of the accused person to anybody. Further this witness for the first time disclosed the fact of conspiracy in his statement U/S 161 Cr.P.C. to the I.O. at Haldwani but SI. R.A. Sharma P.W.9 has stated that the fact of conspiracy was disclosed by Gurmel Singh in Sitarganj. In this way both are saying two different things. Even site plan where the conspiracy was planted was not prepared an investigation was not conducted in that direction.

25- The trial court has also given finding that Ramesh Lal in his dying declaration statement did not name Ajab Singh, Jeet Singh, Ganga Singh, and Avtar Singh and it may be the reason that on account of enmity they have been named in the F.I.R. by his brother Khairati Lal. It is relevant to mention here that Ramesh Lal after giving his dying declaration has survived and he has appeared before.

the trail court and gave his on oath statement and in this event of the case his earlier statement given in the form of dying declaration has no relevance and this statement can only be used for contradicting him with the later statement given on oath. Further his on oath statement is contradictory on the point as he had named these four persons as main assailants. The witnesses Ramesh Lal and Khairati Lal have admitted enmity against the accused persons and this possibility cannot be ruled out that the witnesses are deposing falsely against the accused/appellant as they have also not assigned the role to the appellant in participating in actual 'marpit'.

26- After considering the evidence produced in the case, I am of the firm view that the case of the present accused/appellant is similarly placed to that of co-accused and on same set of facts and on similar accusations the co-accused have been acquitted by the learned Sessions Judge and its benefit can be extended to the present accused/appellant. The facts of the **Deepak Rajak case (**supra), cited by the learned defence counsel, are applicable to the facts of instant case.

27- I am, therefore, of the firm view that the learned trial Court has committed manifest error by holding the accused/appellant guilty in the present case.

28- The appeal is liable to be allowed and the impugned judgment and order is liable to be set aside.

29- Accordingly, the appeal is allowed. The impugned judgment and order dated 18-6-1986 passed by the II Additional Sessions Judge, Nainital convicting the accused/appellant Hamid Ali U/S 307/34 I.P.C. and sentencing him to undergo R.I. for four years is set aside. The accused/appellant is on bail. His bail bonds are cancelled and sureties discharged. He need not surrender.

(B.C. Kandpal, J.)

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